Filed 9/27/10

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

| | |
|---|---|
| BRENTON R. SMITH,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>SELMA COMMUNITY HOSPITAL,<br><br>Defendant and Respondent. | F057802<br><br>(Super. Ct. No. 05CECG02293)<br><br>**ORDER MODIFYING OPINION, AND DENYING REHEARING AND JUDICIAL NOTICE**<br>[No Change in Judgment] |

**THE COURT:**

It is ordered that the opinion filed herein on September 1, 2010, and reported in the Official Reports (188 Cal.App.4th 1) be modified in the following particulars:

1. On page 3, in the first full paragraph, beginning "A fundamental issue" the second sentence and its footnote are deleted and the following sentence and footnote are inserted in its place:

> Because motive, which is one aspect of state of mind, usually is shown by circumstantial evidence, we will describe in detail some of the evidence in the record regarding Smith's relationship with SCH and its affiliates.[2]

Footnote 2 will read as follows:

> [2]This description of evidence should not be read as setting forth all of the circumstantial evidence from which a trier of fact could draw inferences regarding the state of mind or motive of SCH and its affiliates.

2. On page 5, the second sentence in footnote 6 is modified to read:

> For instance, according to Smith, Adventist Health told him that it would see him in a federal penitentiary within six months.

3. On page 5, in the last paragraph beginning "On Friday, July 5, 2002," the first sentence is modified to read:

> On Friday, July 5, 2002, according to Smith, he met with Remboldt about the sale of Smith's clinics.

4. On page 7, delete the last sentence of footnote 7 and replace it with the following:

> Those proceedings on remand were delayed by the death of the first referee. Recently, however, a subsequent referee issued a "Final Statement of Decision Following Appeal and Remand" dated June 24, 2010.
>
> SCH has requested this court to take judicial notice of the decision, which it characterizes as containing findings of multiple and knowing instances of Smith's double-billing to the federal and state governments. The request for judicial notice is denied because the statement of decision (1) was not before the trial court when it decided the attorney fees motion, (2) is not dispositive of any issue decided in this appeal, and (3) is not a final decision for purposes of claim or issue preclusion.

5. On page 27, delete the last sentence of footnote 22 and replace it with the following:

> This concern and deficiencies in the Health Care Quality Improvement Act of 1986 (42 U.S.C. § 11101 et seq.) caused the Legislature to state "it is preferable for California to 'opt-out' of the federal act and design its own peer review system." (§ 809, subd. (a)(2).) In addition, the Legislature found and declared: "[T]he laws of this state pertaining to the peer review of healing arts practitioners shall apply in lieu of Section 11101 and following of Title 42 of the United States Code, because the laws of this state provide a more careful articulation of the protections for both those undertaking peer review activity and those subject to review, and better integrate public and private systems of peer review. Therefore, California exercises its right to opt out of specified provisions of the Health Care Quality Improvement Act relating to professional review actions, pursuant to Section 11111(c)(2)(B) of Title 42 of the United States Code. This election shall not affect the availability of any immunity under California law." (§ 809, subd. (a)(9)(A).)

> We recognize that a few months after California's peer review legislation became effective, Congress amended the federal statute to repeal the so-called opt out provision. (See Pub.L. No. 101-239, § 6103(e)(6)(A) (Dec. 19, 1989) 103 Stat. 2106, 2208.) Notwithstanding Congress's amendment, the foregoing explicit findings by the Legislature and the textual differences between section 809.9 and the federal attorney fees provisions lead us to conclude that the federal case law and the federal legislative history are poor guides for determining the intent and purpose of the California Legislature in enacting section 809.9. Consequently, we have not relied on the federal materials in deciding the meaning of section 809.9.

6. On page 46, at the top of the page and before the last sentence of the paragraph that begins "Consequently, we will remand," insert the following:

> These circumstances are sufficient to overcome the general presumption of correctness usually afforded a trial court's order. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [presumption of correctness is a general principle of appellate practice].)

Except for the modifications set forth, the opinion previously filed remains unchanged. There is no change in the judgment.

The petition for rehearing filed by respondent is denied. The respondent's motion for judicial notice that accompanied the petition for rehearing is denied.

_____

DAWSON, J.

WE CONCUR:

_____

LEVY, Acting P.J.

_____

KANE, J.